Human Rights and Contemporary International Law

por D. Ian Brownlie

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At the outset it is my pleasant duty to offer my thanks to the President of the Forum Deusto and his colleagues for their gracious invitation and the kindness and hospitality shown to my wife and I. I am also grateful to Professor Jaime Oraa for his practical assistance and personal kindness.

The subject matter usually described as «human rights» in contemporary political and legal discourse is extremely varied and extensive. It includes concern about the treatment of political prisoners, the right of self-determination for Palestinians and other oppressed peoples, the status of women, the right to leave one's own country, the right of immigrant communities to maintain their own culture and religion, the legal status of trade unions, collective bargaining, and so forth. Obviously my purpose must be to select certain aspects of this large topic.

It will be useful if some attention is given to terminology and concepts in the first place.

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The precise term «human rights» appears in diplomatic life for the first time at the San Francisco Conference in 1945 and in various provisions of the United Nations Charter. The actual phrases used refer to «the principle of equal rights and self-determination of peoples», and to «respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion»: see Articles 1, 13, 55, 56 and 76 (in particular). In addition in the Preamble to the Charter it is declared that:

> «*We the peoples of the United Nations determined* ... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small ....»

The term «human rights» in fact appears for the first time in the years 1942 to 1944 in the course of internal policy discussions in the United States on the subject of the principles on which the postwar organization would be based. It is obvious that the term «human rights» is more or less the equivalent of earlier terms, such as the «Rights of Man», the «rights» of citizens as set forth in the American Bill of Rights, and the older concept of «natural rights».

Whatever significance attaches to changes in the terminology, since the creation of the United Nations the connotation, the ramifications, of the concept of human rights have undergone significant changes. Before 1945 the Rights of Man and cognate principles were principally a part of the world of politics and ideas. Since 1945 in the era of the United Nations the concept of human rights has acquired a multilateral sanction, a harder outline, a legitimacy on the international plane. The principles of human rights have emerged as an objective and general international legal standard. The consequence has been that the principles of human rights now constitute a standard which is external to the individual states but also intrusive. In other words domestic legal and social values have now become subject to external tests and evaluation. Even the normal application of national legal rules to the citizens of the given state may not be sufficient, if the rules themselves fail to accord with the relevant external standards. Before 1945 the application of what would now be called human rights standards was a matter of political exception. The Covenant of the League of Nations contained no generally applicable principles of this kind. Only in the specialised contexts of Mandated territories, and treaty provisions —in the Peace Treaties and Minorities Treaties of the years 1919 to 1920— were standards imposed.

The development of the generally applicable and intrusive standards of human rights since 1945 has raised the issue of the domestic jurisdiction of states in an acute form. More especially as a result of the Cold War, precedents grew up in the practice of the organs of the United Nations according to which a large number of questions, previously regarded as internal matters, were now categorised as matters of «international concern» and subject to discussion and evaluation. Defining the core of matters which were not affected by external standards has now become more difficult.

I turn now to a preliminary question, that of the «Applicable Law».

Human rights is a broad area of concern and the potential subject-matter ranges from the questions of torture and fair trial to the so-called third generation of rights, which includes the right to food, the right to economic development, and the right to health.

Many lawyers in academic life refer to an entity described as «International Human Rights Law» which is assumed to be a separate body of norms. While this is a convenient category of reference, it is also a source of difficulty. Human rights problems occur in specific contexts. The issues may arise in domestic law, or within the framework of a standard-setting convention, or within general international law. But there must be reference to the specific and relevant applicable law. There is thus the law of a particular State, *or* the principles of the European Convention on Human Rights, *or* the relevant principles of general international law. But in the real world of practice and procedure, there is no such entity as «International Human Rights Law» and, when this concept is imposed on students, it can only be a source of confusion. Since it is not an «applicable law», it divorces learning in universities from the actual procedural contexts in which problems arise.

Moreover, the segregation of human rights law would not be a beneficial development and it must remain a part of the mainstream of public international law.

I turn now to the principal techniques by which the standards of human rights are propagated and implemented.

There can be no doubt that the main corpus of human rights standards consists of an accumulated code of multilateral standard-setting conventions. These fall into four general categories. First of all, the two comprehensive International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights adopted in 1966. Secondly, the comprehensive regional conventions: the European

Convention on Human Rights of 1950, the American Convention on Human Rights of 1969, and the African Charter on Human and Peoples' Rights of 1981. Thirdly, the conventions dealing with specific wrongs, such as genocide, torture or racial discrimination. Fourthly, the conventions related to the protection of particular categories of people: women, children, refugees and migrant workers.

The classical and still general method of enforcement is by means of the duty of performance of treaty undertakings imposed on the States Parties. It is the domestic legal systems of the States Parties to the given convention which are the vehicles of implementation. Thus the International Covenant on Civil and Political Rights contains express provisions setting forth the duty to ensure that domestic law provides sufficient means of maintenance of the treaty standards. It is a characteristic of such treaties that the means of implementation of conventional duties are a matter of domestic jurisdiction.

The importance of standard —setting by means of multilateral conventions is undoubted but, paradoxically, in the area of human rights certain non-binding instruments have had a major role to play. Indeed, as a matter of historical sequence it was a non-binding instrument which surfaced before the International Covenants, the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948. Moreover, another non-binding instrument, the Helsinki Final Act, was also to have considerable significance in practice.

The two instruments have particular interest for lawyers because they demonstrate that the normative impact of an instrument does not necessarily depend upon its formal legal status.

The Universal Declaration of Human Rights was adopted in the form of a General Assembly resolution. The voting was 48 for, none against, and eight abstentions. By reason of its form, and for other reasons, the Declaration was clearly not a legally binding instrument *as such,* and at the time of its adoption some of its provisions departed from the generally accepted rules. Nevertheless, the Universal Declaration has had influence in at least three different ways. First, it has had the status of an authoritative guide, produced by the General Assembly, to the interpretation of the Charter. It soon became accepted as part of the «Law of the United Nations». Secondly, some of its provisions either constitute general principles of law or represent elementary considerations of humanity. And thirdly, the Declaration has been invoked by municipal courts.

The Declaration is a good example of an informal prescription given legal significance by the actions of authoritative decision-makers, and thus it has been used as a standard reference in the Helsinki Declaration, the second of the «non-binding» instruments which have been of considerable importance in practice.

On 1 August 1975 there was adopted the Final Act of the Conference on Security and Co-operation in Europe in Helsinki. This contains a declaration of principles under the heading «Questions Relating to Security in Europe». The Final Act was signed by the representatives of 35 States, including the United States and the USSR.

The document was obviously not in treaty form, and therefore not legally binding as such. The United States, along with other signatories, affirmed that the instrument was not legally binding. At the same time the document constitutes evidence of the acceptance by the participating States of certain principles as principles of customary or general international law, including the standards of human rights.

The significance of the Helsinki Final Act was recognised by the International Court in its Judgment on the Merits in the case of *Nicaragua v United States.* In the words of the Court:

> «Also significant is United States acceptance of the principle of the prohibition of the use of force which is contained in the declaration on principles governing the mutual relations of States participating in the Conference on Security and Co-operation in Europe (Helsinki, 1 August 1975), whereby the participating States undertake to "refrain in their mutual relations, *as well as in their international relations in general",* from the threat or use of force. Acceptance of a text in these terms confirms the existence of an *opinion juris* of the participating States prohibiting the use of force in international relations.»

Apart from the standard-setting role of the multilateral conventions and of non-binding instruments, such as the Helsinki Declaration, the relevance of customary or general international law must not be underestimated.

The vast majority of States and authoritative writers would now recognise that the fundamental principles of human rights form part of customary or general international law, although they would not necessarily agree on the identity of the fundamental principles. In 1970 the International Court, delivering judgment in the *Barcelona Traction* case, referred to obligations *erga omnes* in contemporary international

law and these were stated to include «the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination». The Final Act of the Helsinki Conference of 1975 included a «Declaration of Principles Guiding Relations between Participating States». This Declaration includes a section on human rights and the following paragraph appears in that section:

> «In the field of human rights and fundamental freedoms, the participating States will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights. They will also fulfil their obligations as set forth in the international declarations and agreements in this field, including *inter alia* the International Covenants on Human Rights, by which they may be bound.»

It is evident that the participating States recognise that human rights standards form part of general international law: thus the *Digest of United States Practice in International Law* (United States Department of State, 1975, p.7) sets forth the Declaration referred to in the previous paragraph under the heading: «Rights and Duties of States».

The significance of the role of the «customary international law of human rights» is recognised in the most recent edition of the *Restatement of the Law: The Third.* Under the rubric just quoted the following proposition appears:

> «A State violates international law if, as a matter of State policy, it practises, encourages, or condones
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> (1) genocide,
> (2) slavery or slave trade,
> (3) the murder or causing the disappearance of individuals,
> (4) torture or other cruel, inhuman or degrading treatment or punishment,
> (5) prolonged arbitrary detention,
> (6) systematic racial discrimination, or
> (7) a consistent pattern of gross violations of internationally recognised human rights.»

Thus far the role of standard-setting principles has been considered in general terms. The question of practical application and implementation must now be addressed.

The primary method of implementation relies upon the domestic jurisdiction of the individual State, including its legislative process. The

primary duty of the State Party to a multilateral convention establishing human rights standards is to bring its own law into line with its treaty obligations.

The issue of implementation is much more problematical in relation to the non-binding instruments like the Helsinki Final Act. This instrument was probably only accepted on the basis that it did not involve legal obligations. However, in so far as the content of such a document may be said to be declaratory of general international law, then it may be invoked as between the parties with the added bonus that it represents a regional political commitment. In the case of the Helsinki Declaration, at the Vienna Meeting of the CSCE Conference in 1989 a procedure was created allowing for the making of complaints by participating States through diplomatic channels.

In other respects the procedural invocation of human rights standards is inhibited by conservative thinking about the concept of a legal interest, that is to say, of *locus standi*. It is difficult to invoke human rights standards in the context of general international law unless a specific treaty provision has been violated or there is a wrong involving the human rights of a national of the complainant State. At least it is now established that a party to a multilateral standard-setting treaty may raise questions of violation whether or not the victim is a national of the complainant State.

The most impressive method of implementation involves giving individuals the power to petition a judicial or quasi-judicial body. Thus Article 25, para. 1 of the European Convention on Human Rights provides:

> «The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made a declaration undertake not to hinder in any way the effective exercise of this right».

The system of individual complaints has many advantages and the results of the work of the European Commission and the European Court of Human Rights have, in some respects, been impressive. The level of accountability has been raised. Systematic deficiencies in domestic systems have been revealed and necessary legislative changes have resulted.

The European system works reasonably well but it has certain significant limitations. The system of petitioning is slow and is limited by the requirements of prior exhaustion of local remedies. There is a notable reluctance on the part of the Committee of Ministers to confront serious situations involving multiple and systematic violations of the Convention.

One of the more positive contributions of the Convention system has been the refinement of key concepts of human rights in the legal sphere. These concepts include non-discrimination, the margin of appreciation, equality of arms, and restrictions «necessary in a democratic society».

However, in various respects the system relies upon the functioning of the domestic legal system of the Respondent State. Nowhere is this so clear as in the provisions of Article 50 of the Convention:

> «If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party, is completely or partially in conflict with the obligations arising from the present Convention and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party».

This provision appears to leave the possibility of specific restoration of rights open to question, given the degree of discretion permitted to the High Contracting Party, found to have acted in violation of the Convention, in affording just satisfaction.

Finally, it is to be noted that the Convention does not protect groups as such. However, inter-State proceedings by virtue of Article 24 may relate, in effect, to the rights of minorities and there may be a pattern of individual petitions relating to an issue affecting a group. Thus, the *Belgian Linguistics* case before the European Court (Series A, No. 6) concerned the access of certain children to French-language schools, in relation to the right to education and to the concepts of discrimination and proportionality. The case was presented by the parents of French-speaking children in the form of six Applications and involved six administrative districts.

I have completed my brief review of methods of implementation and shall move on to consider the diverse purposes and strategies which human rights principles may be made to serve. At least seven separate purposes can be identified.

Since human rights standards were invented, they have been employed for purposes of foreign policy which may be unrelated to human rights as such.

During the course of the Cold War there was an interesting reversal. In the earlier period, up to 1970, the Soviet *bloc* invoked human rights and selfdetermination against the colonial powers, who reacted defensively by asserting that such matters fell within the reserved domain of domestic jurisdiction.

In the early nineteen-seventies circumstances changed. The process of decolonisation was more or less complete, and the Western powers turned the tables by making adherence to human rights standards the price for accepting Soviet proposals concerning security in Europe. The outcome was the Final Act of the Helsinki Conference adopted in 1975. As presented to public opinion by the Western States, this was exclusively about human rights and was given a higher legal profile than Moscow had expected.

Human rights is often used as a basis for opportunist external support for minorities. During the crisis in Central America, involving American pressures upon the Sandinista Government in Nicaragua, the United States placed the treatment of the Miskitos on the political agenda. When this encouraged the Miskitos in Honduras to make political demands, interest in the Miskito issue died away.

And it must be recognised that on many occasions, human rights are used to promote what are essentially special interests. During the Nigerian Civil War of 1966 to 1970, the Biafran side used skilful propaganda to build a useful image of exclusive righteousness. The truth was much more complex. In the later years of the Soviet Union, Zionist organizations promoted the cause of Jewish migration on the basis of human rights although the best known exponent. Mr. Sharansky has not shown much interest in human rights issues since his arrival in Israel.

The concepts of human rights and democracy have also formed the basis for important monitoring operations to ensure the validity of the electoral process in unstable regions. Such operations have been carried out by the Organization for Security and Co-operation in Europe in the Caucasus.

Human rights standards may be invoked to protect the interests of private corporations in face of programmes of nationalisation or acts of individual expropriation. Article 25 of the European Convention refers

to any «nongovermnental organization» among the potential petitioners.

Among the many purposes which human rights may serve, perhaps the most important in practice is that of providing a legal basis for the monitoring of conditions in prisons and detention centres. This preventive function is carried out by the European Committee for the prevention of torture and inhuman or degrading treatment or punishment. This body was set up under the Council of Europe Convention of the same name adopted in 1987. The Convention has thirty-five parties.

Yet another distinct role of human rights, together with international humanitarian law, is the monitoring and amelioration of the condition of people living in areas under various kinds of military occupation. In these situations, the monitoring role will often be vested in the Intennational Committee of the Red Cross or in United Nations peacekeeping forces with temporary mandates, as, for example, recently in Haiti.

On occasion human rights, in association with related concepts of war crimes and crimes against humanity, serve a general, more or less legislative, role of establishing important standard-setting precedents and elements of deterrence for the future. Obvious examples include the Charters of the Intennational Military Tribunals at Nuremberg and Tokyo and the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Intennational Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

This review of the different purposes or strategies which human rights concepts may serve produces a mixture of light and dark areas, of the good and the bad. This general outcome is not very surprising. Just as the motor car may be used both for taking people to hospital or for the robbery of banks, so may norms be put to both good and bad purposes.

In the concluding sections of my lecture I shall examine some complex areas of interaction and convergence between human rights standards and other sets of values.

The first such area of convergence consists of the relations between the legal principles concerning human rights and the precepts of the Rule of Law. These relations involve paradoxes and tensions which inevitably trouble the observer.

The source of the difficulty can be summarised in three propositions.

First: the legal developments based upon human rights, including the creation of Ad Hoc Criminal Tribunals and the emplacement of UN security forces in Bosnia and Somalia, provide a broad spectrum of intrusive actions for humanitarian purposes.

Secondly: in practice such action is not applied consistently. Thus, for example, it is not expected that there will be an Intennational Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Palestine since 1948 (or 1967).

Thirdly: the result is that the very legal strength of the available humanitarian responses makes the element of preference in mounting such responses the more clearly inconsistent with the Rule of Law.

In the case of the former Republic of Yugoslavia, there must be a strong suspicion that the pattern of indictment for war crimes reflects a collateral policy of attacking the legitimacy of the Government of the Republic Srpska.

Similar problems arise from resort to humanitarian intervention. A small number of writers are promoting the idea of humanitarian intervention, and certain related doctrines, as justifications for the use of force. The whole area of forcible intervention to protect human rights is full of paradox and irony. The idea of armed intervention, involving the use of modern weapons and massive fire-power, in order «to protect human rights» is not exactly attractive. Moreover, the proven consequence of foreign intervention is to weaken local public order systems, exacerbate internal tensions, and to precipitate communal strife and refugee flows. Recent developments in Bosnia and Somalia provide significant experience with particular reference to intervention which involves interference in situations of civil war.

Intervention also creates confusion in the local patterns of legitimacy. When Mr. Endara was installed in Panama by United States forces on the basis of exit polls, he had not been consulted by the United States about the invasion, even although he was, according to the United States, the lawful ruler. Prior to the intervention in Haiti in September 1994 the United States did not consult Mr. Aristide who was, according to Washington, the lawful ruler. The irony in such situations is that the local military government is effectively replaced by a foreign military administration, which has no local legitimacy whatsoever, and which is often operating in accordance with inappropriate rules of engagement.

The latest eccentric doctrine is that intervention is lawful to restore democracy. Such a principle is not to be found in existing general international law, and if it is relied on in practice the consequences will be disastrous. Interventions «to restore democracy» or «to maintain human rights» cannot begin to generate new custom unless they are accompanied by *opinion juris.* But they are not. The evidence for the absence of *opinion juris* includes three elements at least. The occasions on which such actions are taken are so selective and so discriminatory that no considerations of law are dominant. Action to protect the Kurds in Iraq was in 1992 accompanied by an absence of action to protect Kurds in Turkey or, indeed, at certain stages, an absence of action to protect Kurds in Iraq from bombing by the Turkish airforce. The second element is the existence, in many cases, of overriding collateral reasons: this was particularly true of the intervention in Panama. The third element is the absence of consent from or even consultation with the very persons who are the supposed beneficiaries of the intervention concerned.

It will be useful to indicate a few other examples of interaction and convergence. All codifications of human rights recognise the right to freedom of thought, conscience and religion. This principle is inevitably in tension with the principle of the equality of men and women in those societies in which certain forms of religious belief deny the equality of women.

Similar problems arise when recognition is given to the rights of indigenous peoples as in the Convention Concerning Indigenous and Tribal Peoples in Independent Countries adopted by the I.L.O. in 1989. It is the case that the traditional practices of such peoples may involve rules relating to women and also certain traditional punishments which are incompatible with normal standards of human rights.

A quite different problem of convergence relates to economic development. There are certain experts in development economics who contend that if a country such as India becomes a party to standard-setting Conventions such as the ILO Conventions on conditions of work this would retard the stage at which economic development reaches its critical phase of growth. On this view the implementation of human rights standards is inimical to economic development in societies at a certain stage of development.

The conclusion of this address focuses upon a final but decisive area ot convergence. The significance and the roles of human rights must not be allowed to minimise the importance of legality within the national legal systems. The legal systems of State have a complementarity with

international standards of human rights. Each has need of the other. If the State collapses the role of human rights standards is minimised. The Rule of Law within the individual States remains paramount. The successful operation of the international modalities for implementation of human rights standards depends upon the stability of internal systems. This may be a paradox but it is of fundamental importance.

Resumen

Existen varios instrumentos para la implementación de los derechos fundamentales del hombre. Por un lado, hay tratados internacionales que amparan estos derechos y una de las características principales de los mismos es que su aplicación se realiza normalmente en la jurisdicción de cada país. El sistema legal de cada Estado es el que establece las normas que darán lugar a los vehículos de aplicación. Existe además el Convenio Internacional en Derecho Político y Civil que contiene las previsiones que reforzarán los derechos y asegurarán que esas leyes proporcionen un compromiso de mantenimiento de los tratados fundamentales.

Estos tratados juegan un papel fundamental a pesar de su carácter de «no obligatoriedad». Se citan en este sentido la Declaración Universal de los Derechos Humanos, adoptada por la Asamblea General de las Naciones Unidas, y el Acta Final de Helsinki, documentos que demuestran que el impacto normativo no depende exclusivamente del marco legal de cada Estado.

A pesar de todo ello, la ley general y tradicional de cada país tiene gran importancia. En este sentido, cada Estado miembro debe adaptar los derechos fundamentales a su propia norma y en línea con sus obligaciones, a pesar de que, en algunos casos, es difícil invocar los derechos fundamentales en el contexto general de la ley internacional, cuando la previsión de un tratado específico ha sido violado o hay un conflicto que afecta a los derechos humanos del ciudadano de un Estado demandante.

A este respecto posee muchas ventajas el sistema de demandas individuales, cuyo resultado ha sido la Comisión Europea y la Corte Europea de Derechos Humanos, sistemas que funcionan bien pero con ciertas limitaciones. Una de sus mejores contribuciones ha sido el refinamiento de los conceptos clave de los derechos humanos en la esfera legal.

El autor aboga por caminar hacia una área de convergencia en la cual el papel de los derechos humanos no debería restar importancia a la legalidad del sistema nacional. Los sistemas legales de cada Estado son complementarios y cada uno necesita del otro. «Si un Estado colapsa a otro, los derechos se minimizan. Por tanto, el Estado de Derecho dentro de cada país es de máxima importancia. En este sentido, el éxito de implementación de los tratados internacionales depende de la estabilidad de cada sistema interno. Algo paradójico pero de valor fundamental».